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Torts - Invasion of the Right of Privacy: Lapse of Time and the Destruction of the Newsworthiness Privilege - Wagner v. Fawcett Publications, 307 F. 2d 409 (7th Cir. 1962)

DePaul College of Law

TORTS–INVASION OF THE RIGHT OF PRIVACY: LAPSE OF TIME AND THE DESTRUCTION OF THE NEWSWORTHINESS PRIVILEGE

The plaintiff was the mother of fourteen-year-old Mary Lou Wagner, the victim of a brutal rape-murder in Chicago on November 29, 1957. The local press and the wire services reported the crime and the apprehension of the slayer. In March and April, 1958, five independent "detective magazines" each reported and published stories of the Wagner murder. These stories contained factual accounts of the crime and the apprehension of the murderer, pictures of the deceased and the plaintiff and information as to the plaintiff's age and place of employment.

The plaintiff,[1] seeking damages for mental pain and suffering, brought an action in the District Court of the United States in the Northern District of Illinois charging each of the five publishing companies with invading her right of privacy by printing stories disclosing her identity and portraying her likeness without her authority. On the defendants' motion to dismiss the complaint on the ground that the matters published were of public interest and newsworthy, the District Court, Judge J. Sam Perry, presiding, ruled in favor of the defendants and dismissed the action. Upon appeal by the plaintiff, the United States Court of Appeals for the Seventh Circuit in an opinion written by Judge Elmer Schnackenberg reversed the District Court and stated that a jury could find that the events surrounding the death of Mary Lou Wagner had ceased to be news and, therefore, the publication of these events by the defendants constituted an invasion of privacy.[2] On re-hearing the Court of Appeals reversed its prior decision and affirmed the District Court's judgment for the defendants. The appellate court in its subsequent holding found that because the plaintiff was a witness at the trial of her daughter's murderer and the publishing by defendants was contemporaneous with this trial, there was, in fact, no lapse of time which would extinguish the privilege of the press to publish newsworthy materials. *Wagner v. Fawcett Publications*, 307 F.2d. 409 (7th Cir. 1962).

The action for invasion of privacy was not generally recognized as a separate action until 1890. In that year Samuel D. Warren and Louis D. Brandeis wrote the article[3] that laid the foundation for the modern tort of invasion of privacy. They reasoned that, "the design of the law must be to

[1] Although the plaintiff also brought suit as administrator of her daughter's estate, discussion of her individual suit is only pertinent here.

[2] This opinion has been withdrawn.

[3] Warren and Brandeis, The Right to Privacy, 4 Harv. L. Rev. 193 (1890).

protect those persons with whose affairs the community has no legitimate concern, from being dragged into undesirable and undesired publicity. . . ."[4] The creation of this cause of action necessarily requires that a balance be struck between the freedom of the press and the individual's right of privacy. Since application of this tort action might, therefore, have limited the constitutionally guaranteed freedom of the press, Warren and Brandeis pointed out that "the right of privacy does not prohibit publication of matter which is of public or general interest."[5]

Today, the action for invasion of privacy is recognized in one form or another by statute in three jurisdictions[6] and by common law decision in thirty-one others.[7] In four,[8] the action has been rejected by the courts and not recognized by the legislature. However, because of the zealously protected privilege of newspapers and other forms of mass communication media to report items of general or public interest, the courts have held

[4] *Id.*, at 214. [5] *Ibid.*

[6] Utah Code Ann. §§ 76-4-8 and 76-4-9 (1953); Va. Code Ann. § 8-650 (1950); Civil Rights Law §§ 50-52 (N.Y.).

[7] Alabama: Smith v. Doss, 251 Ala. 250, 37 So. 2d 118 (1948); Arizona: Reed v. Real Detective Pub. Co. 63 Ariz. 294, 162 P.2d 133 (1945); California: Gill v. Curtis Pub. Co., 38 Cal. 2d 273, 231 P.2d 565 (1951); Connecticut: Korn v. Rennison, 21 Conn. Super. 400, 156 A. 2d 476 (1959); Delaware: Miller v. National Broadcasting Company, 157 F. Supp. 240 (D. Del. 1957); District of Columbia: Peay v. Curtis Pub. Co., 78 F. Supp. 305 (D.D.C. 1948); Florida: Cason v. Baskin, 155 Fla. 198, 20 So. 2d 243 (1944); Georgia: Bazemore v. Savannah Hospital, 171 Ga. 257, 155 S.E. 194 (1930); Illinois: Eick v. Perk Dog Food Co., 347 Ill. App. 293, 106 N.E. 2d 742 (1952); Indiana: Continental Optical Co. v. Reed, 119 Ind. App. 643, 86 N.E. 2d 306 (1949); Iowa: Bremmer v. Journal Tribune Pub. Co., 247 Iowa 817, 76 N.W. 2d 762 (1957); Kansas: Kunz v. Allen, 102 Kan. 883, 172 P. 532 (1918); Kentucky: Brents v. Morgan, 221 Ky. 765, 299 S.W. 967 (1927); Louisiana: Itzkovitch v. Whitaker, 115 La. 479, 39 So. 499 (1927); Maryland: Graham v. Baltimore Post Co. (Decided by Baltimore Superior Court in 1932; reported in 22 Ken. L.J. 108); Michigan: Pallas v. Crowley, Milner & Co., 322 Mich. 411, 33 N.W. 2d 911 (1948); Mississippi: Martin v. Dorton, 210 Miss. 668, 50 So. 2d 391 (1951); Missouri: Barber v. Time, Inc., 348 Mo. 1199, 159 S.W. 2d 291 (1942); Montana: Welsh v. Roehm, 125 Mont. 517, 241 P.2d 816 (1952); Nevada: Norman v. City of Las Vegas, 64 Nev. 38, 177 P.2d 442 (1947); New Jersey: McGuvern v. Van Riper, 137 N.J. Eq. 24, 43A. 2d 514 (1945); New Mexico: Hubbard v. Journal Pub. Co., 69 N.M. 473, 368 P. 2d 147 (1962); North Carolina: Flake v. Greensboro News Co., 212 N.C. 780, 195 S.E. 55 (1938); Ohio: Housh v. Peth, 165 Ohio St. 35, 133 N.E. 2d 340 (1956); Oklahoma: Hazlitt v. Fawcett Publications, Inc., 116 F. Supp. 538 (D. Conn. 1953); Oregon: Hinish v. Meier & Frank Co., Inc., 166 Ore. 482, 113 P. 2d 438 (1941); Pennsylvania: Jenkins v. Dell Publishing Co., 251 F. 2d 447 (1958); South Carolina: Holloman v. Life Ins. Co. of Va., 192 S.C. 454, 7 S.E. 2d 169 (1940); South Dakota: Truxes v. Kenco Enterprises, Inc., 119 N.W. 2d 914 (1963); Tennessee: Langford v. Vanderbilt University, 199 Tenn. 389, 287 S.W. 2d 32 (1955); West Virginia: Roach v. Harper, 143 W.V. 869, 105 S.E. 2d 564 (1937).

[8] Nebraska: Brunson v. Ranks Army Store, 161 Neb. 519, 73 N.W. 2d 803 (1955); Rhode Island: Henry v. Cherry & Webb, 30 R.I. 13 (1909), 73 A. 97; Texas: Milner v. Red River Valley Pub. Co., 249 S.W. 2d 227, Tex. Civ. App., (1952); Wisconsin: Judevine v. Benzies-Montayne Fuel & Whse. Co.; 222 Wis. 512, 269 N.W. 295 (1936).

that people who have become involved in events of public interest have lost their right of privacy.[9]

The United States Supreme Court has held that not only newspapers, but magazines as well, are entitled to the protection of the First Amendment. In *Winters v. New York*,[10] the Court emphasized this in the following language:

> Thought we can see nothing of any possible value to society in these magazines, they are as much entitled to the protection of free speech as the best of literature.[11]

The Supreme Court has also held that publications which entertain rather than inform are protected by the First Amendment:

> The line between the informing and the entertaining is too elusive for the protection of that basic right.[12]

Therefore, the fact that a magazine may entertain and not inform is no basis for denying to that magazine the newsworthiness privilege and First Amendment protections. Although *Burstyn v. Wilson*[13] involved the application of the First Amendment to motion pictures, the Supreme Court stated that the profit motive forms no basis for denying a medium its constitutional right of free expression.[14] The Court of Appeals, in its first opinion in the instant case, held that the time lapse, robbing the articles of newsworthiness, constituted an invasion of the right of privacy.

The original Appellate Court decision weighed whether the four months lapse of time between the *crime* and the publication destroyed the defense of newsworthiness. In answering defendants' contention that the death of Mary Lou Wagner would never cease to be "news" the Appellate Court stated:

> . . . we are of the opinion that the trier of facts could find the articles in question, published months after the death of Mary Lou Wagner, had ceased to be news and for that reason these articles were not published in news media, but in magazines sold for the entertainment of their readers. By our holding we in no way suppress the legitimate publication of news; rather we condemn the pursuit for commercial purposes of those who may have been connected with matters which were, at the time of the occurrence, newsworthy. When the news media have served their proper function in reporting current events, private individuals involved therein sink back into the solitude which is the right of every person. That solitude involves a privacy which no publication has a right to thereafter invade solely for the purpose of selling to its readers lurid accounts of tragedy.

[9] Buzinski v. Do-All Company, 31 Ill. App. 2d 191, 175 N.E. 2d 577 (1961).

[10] 333 U.S. 507 (1948).

[11] 333 U.S. at 510.

[12] *Ibid.*

[13] 343 U.S. 495 (1952).

[14] 343 U.S. 495, 501–02.

This holding represents a departure from prior decisions in invasion of privacy cases in that it holds that a lapse of time is sufficient to erase the "newsworthiness" privilege.

The Appellate Court of California in *Smith v. National Broadcasting Company*[15] held that a passage of three months time from the occurence of a newsworthy event[16] to its broadcast on a radio program was not a factor to be considered in determining whether plaintiff had resumed a position of solitude in the community. In holding that the plaintiff could not maintain an action for invasion of privacy the court concluded that: "It is well established . . . that the mere passage of time does not preclude the publication of such incidents from the life of one formerly in the public eye which are already public property."[17]

Molony v. Boy Comics Publishers, Inc.[18] involved a six month lapse of time between the happening of the event and its publication in defendant's magazine. When an airplane crashed into the Empire State Building in New York City, Molony rushed to the aid of the victims of the disaster and gave them first aid treatment. He became a national hero overnight and received a medal from the American Legion. Six months after the accident, Boy Comics published a cartoon story about Molony's deeds. Subsequently, Molony brought an action for invasion of privacy. In denying recovery to Molony the court said, "it is well settled that the right of privacy does not prohibit the publication of matter which is of legitimate public or general interest, although no longer current."[19]

Even a lapse of time of ten years,[20] fifteen years,[21] even of nineteen years[22] from the date of the event to its subsequent broadcast or publication has been held insufficient to destroy the newsworthiness privilege. In *Carlisle v. Fawcett Publications*,[23] the California District Court of Appeal said, "If the necessary elements which would permit the publication of factual matter are present, mere lapse of time does not prohibit publication."[24]

[15] 138 Cal. App. 2d. 807, 292 P. 2d. 600 (1956).

[16] The plaintiff reported to the police the escape of a black panther that caused wide spread panic. Although the plaintiff believed the report to be true, it turned out false.

[17] 138 Cal. App. 2d 807, 814, 292 P. 2d 600, 604.

[18] 277 App. Div. 166, 98 N.Y.S. 2d. 119 (1950).

[19] *Id.* at 170, 98 N.Y.S. 2d. at 122.

[20] Cohen v. Marx, 94 Cal. App. 2d. 704, 211 P. 2d. 320 (1949).

[21] Estill v. Hearst Publishing Co., 186 F. 2d. 1017 (7th Cir. 1951).

[22] Carlisle v. Fawcett Publications, 201 Cal. App. 2d. 733, 20 Cal. Rptr. 405. (1962).

[23] Ibid.

[24] 201 Cal. App. 2d 733, 746, 20 Cal. Rptr. 405, 414.

The leading case on the question of whether a lapse of time alone is sufficient to destroy the newsworthiness privilege in *Sidis v. F-R Publishing Corporation.*[25] In 1910 Sidis was a famous child prodigy who was well known to newspaper readers of the period because of his mathematical prowess. In the years that followed his celebrated graduation from Harvard College at the age of sixteen, Sidis underwent a serious change. He became an obscure clerk and disappeared from public view. The *New Yorker*, after discovering what became of him published an article in 1937 that was, "merciless in its dissection of intimate details,"[26] of Sidis' life. The United States Court of Appeals, Second Circuit, denied recovery to Sidis in his suit against F-R Publishing Corporation for invasion of privacy by holding that by reason of his unusual achievements in the past he was still a newsworthy figure *twenty-seven years* later.

Smith v. Doss[27] is an interesting case involving the disappearance of a man named John Lindgren in 1905. Lindgren was last seen driving a wagon on a lonely country road late at night. The next morning the empty wagon was found but there was no trace of Lindgren. The plaintiffs' father, John Sobrey, was indicted for Lindgren's murder and was held for five months before his release was granted because of insufficient evidence. Twenty-five years later, in 1930, the mystery surrounding the disappearance of John Lindgren was finally solved, when it was discovered that he had actually not been murdered but had died a natural death in California. In 1946, over *forty years* after the disappearance of Lindgren, the defendant broadcasted a radio program about the strange case of John Lindgren. Subsequent to the broadcast, the plaintiffs sued the defendant contending that the broadcast was an invasion of their right of privacy. The Alabama Supreme Court denied recovery on the ground that "The passage of time could not give privacy to his acts because the story of John Lindgren is part of the community."[28]

Thus, even a lapse of time of over forty years between the happening of an event and its publication has been held to be insufficient to destroy the newsworthiness privilege claimed by the defendants in the Wagner case. However, in the Wagner case, the Court of Appeals, in its first opinion, held that a lapse of time of only four months was sufficient to allow Mrs. Wagner to recover. While the Court of Appeals reversed itself on re-hearing, the decision for the publishing companies did not arise from a finding that the four month time lapse between the *crime* and the appearance of the magazine articles was insufficient to sustain the plain-

[25] 113 F. 2d 806 (2d. Cir. 1940). See, Truxes v. Kenco Enterprises 119 N.W. 2d 914 (1963).

[26] 113 F. 2d 806, 807.

[27] 251 Ala. 250, 37 So. 2d. 118 (1948).

[28] *Id.* at 253, 37 So. 2d. at 121.

tiffs' case. Rather the reversal was based on the disclosure that the plaintiff had appeared as a witness in the *trial* and that the magazine articles were presented at *that* time. The court reasoned that the plaintiffs' appearance at a public trial revived the defense of newsworthiness.

In conclusion, it would seem that although the original opinion in *Wagner v. Fawcett Publications*[29] was reversed and is no longer the law, it has fostered confusion in a somewhat settled area of a tort action which is less than three quarters of a century old. By holding that a lapse of time between the occurence of a newsworthy event and its publication in a magazine sold for profit would invade a plaintiff's right of privacy, the Seventh Circuit Court of Appeals has rendered a decision which is against the prevailing weight of authority. Examination of prior authority has shown that even a lapse of time of over forty years between the happening of the event and its subsequent publication forms no basis upon which to destroy the newsworthiness privilege and to permit a plaintiff to recover for invasion of the right of privacy.

UNAUTHORIZED PRACTICE OF LAW–PLANNING ESTATES INCIDENTAL TO SELLING LIFE INSURANCE CONSTRUED AS THE PRACTICE OF LAW

John H. Miller, a layman, was the principal stockholder and president of a corporation which offered a service of aiding individuals in financial and estate planning. The services rendered were either for a fee, or as a gratuitous service incidental to another business which Mr. Miller was engaged in, that of selling life insurance. Each customer received a report from the corporation which usually contained suggestions relating to the transfer of assets, the making of gifts, the use of marital deductions, the use of inter vivos and testamentary trusts and other devices designed to minimize taxes. Upon discovering such practices, the Oregon State Bar brought an action to have Mr. Miller and his company enjoined from preparing any estate plans involving legal analysis. The lower court ruled in favor of the plaintiffs, but specifically held that such legal practices were permissible when directly related to the selling of life insurance. This decree was subsequently modified by the Oregon Supreme Court when it disallowed the lower court's exemption. *Oregon State Bar v. John H. Miller & Co.*,–Ore.–,385 P. 2d 181 (1963).

In analyzing the various issues of the case, the lower court found: that the practices of the defendant could be construed as giving legal advice; and that the defendant had gone to the extent that such advice constituted

[29] 307 F. 2d 409 (7th Cir. 1962).